IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

MONDAY, THE 9TH APRIL 2007 / 19TH CHAITHRA 1929

CRL.A.No. 1629 of 2003()

SC.708/1999 on the file of Addl.Sessions Judge (Ad Hoc-II), Kasaragod

.....

APPELLANT: ACCUSED - A1

P.JAFAR, S/O.P.MOHAMMED, PUNCHAVI,
KANHANGAD VILLAGE, HOSDURG TALUK,
KASARAGOD DISTRICT.

BY ADV. SRI.T.SETHUMADHAVAN
SRI.PUSHPARAJAN KODOTH
SRI.K.JAYESH MOHANKUMAR

RESPONDENTS: COMPLAINANT

STATE OF KERALA, REPRESENTED BY THE
STATE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY
PUBLIC PROSECUTOR, SRI THOMAS JOHN AMBOOKEN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09/04/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M.JAMES, J.

- - - - - - - - - - - - - - - - - - - -

Criminal Appeal No. 1629 of 2003 (D)

- - - - - - - - - - - - - - - - - - - -

Dated this the 9th day of April, 2007

J U D G M E N T

The first accused in Sessions Case No.708/1999, on the file of the Additional Sessions Court (Ad Hoc-II), Kasargod, is the appellant. He faced the trial for the offence punishable under Section 8(1) and 8(2) of the Abkari Act, along with two other accused, the second and the third accused. The allegation against the accused was that they had transported 350 packets of Karnataka arrack in an auto rickshaw, bearing registration No.KL 14 A-4804, at Karuvalam-Theerthamkara road, at Kanhangad Village. Though the accused 2 and 3 ran away and escaped, the appellant was caught. His stand was that he was a passenger in the auto rickshaw. This was rejected by the detecting officer, PW.1, and the final report was filed, after completion of the investigation, by PW.3, against all the three accused. The prosecution examined three witnesses and marked nine documents, together with two material objects. The lower court gave the benefit of doubt to accused 2 and 3, and acquitted

them. However, accepting the plea that the appellant was the passenger and holding that he was carrying the contraband in the auto rickshaw, was found guilty, and, therefore, was convicted and sentenced under Section 8(1) of the Abkari Act to undergo rigorous imprisonment for one year and to pay a fine of rupees one lakh, in default of which to further undergo rigorous imprisonment for a period of three months. Set off was allowed. The first accused is, therefore, before this Court through this appeal challenging the above conviction and sentence.

2. I have heard the arguments advanced by the learned counsel for the appellant, as well as the learned Public Prosecutor. In paragraph (9) of the judgment dated 22/09/2003, in Sessions Case No.708/1999, the learned Additional Sessions Judge discussed and found that there is no evidence against accused Nos.2 and 3, with regard to their identity. The court held:-

> "Who is the RC owner of the vehicle and who is the driver at the time of detection are all doubtful. So as far as A2 and A3 are concerned, the prosecution has not convincingly proved their involvement in the crime. Their names are

> stated in the seizure mahazar and FIR and they surrendered before the court. How they are identified is not established. Therefore they are entitled to the benefit of doubt."

3. The court accepted the plea of the appellant that he was only a passenger. But that does not, ipso facto, mean that it was he who carried the 350 packets of Karnataka Arrack, each packet containing 100ml, in the auto rickshaw. When the trial court found the owner and driver of the vehicle, at the time of detection, was not identified, basing on the evidence brought before the court, it is to be further proved that the contraband was carried by the appellant himself. PW.1 was the Preventive Officer of the Excise Enforcement and Anti-Narcotic Special Squad of Hosdurg. PW.2 was the Additional Village Officer, who prepared the cite plan and, PW.3 was the Excise Inspector, who filed the final report.

4. The prosecution admits that accused 2 and 3, had ran away. No attempt had been made by the prosecution to get the custody of accused 2 and 3, when they had surrendered before the court below, and interrogate them. Nothing is

available to show that it was the appellant who carried the contraband and not the other two accused. Although, the running away of accused 2 and 3 is itself insufficient to doubt them, but it, prima facie, shows that they had prior knowledge of carrying of the contraband in the auto rickshaw. Had they been questioned, together with the owner of the auto rickshaw, the prosecution ought to have established the case, as to who was the actual driver of the auto rickshaw at the time of committing of the crime. Merely because the appellant admitted that he was the passenger, the prosecution cannot fasten the responsibility of carrying the contraband in the auto rickshaw, on him. The prosecution has to prove the case against the appellant, beyond the shadow of doubt. In the case at hand, after acquitting accused 2 and 3, on giving the benefit of doubt, in the nature of the investigation as seen from the records, the liability of transporting the contraband in the auto rickshaw cannot be fixed on the appellant alone. Therefore, he is entitled for the benefit of doubt.

5. In the above circumstances, I hold that the prosecution has not proved the case, as required by law and I,

therefore, acquit him after giving him the benefit of doubt. The conviction and sentence passed by the trial court is set aside. He is set at liberty, cancelling his bail bond. The amount of fine, if any, remitted by the appellant, shall be returned to him, on he moving for the same.

The appeal is allowed as above.

(J.M.JAMES)
Judge

ms